Filed 7/19/19 P. v. Islas CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ANDREW ISLAS,

Defendant and Appellant.

F075575

(Super. Ct. No. F15903774)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Arlan L. Harrell, Judge.

Law Office of Nicco Capozzi and Nicco Capozzi for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Jennifer Oleksa, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Joseph Andrew Islas was charged and convicted of multiple counts of second degree robbery, attempted second degree robbery, and assault with a firearm after robbing or attempting to rob numerous businesses around Fresno over a matter of weeks. He contends the trial court reversibly erred by admitting his statements to police, which

he alleges were taken in violation of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also contends the trial court erred in denying his motion for new trial because he was prejudiced by juror misconduct. Finally, defendant contends he is entitled to a new sentencing hearing to permit the trial court to exercise its discretion and decide whether to strike the firearm enhancements in light of Senate Bill No. 620 (2017–2018 Reg. Sess.) (Senate Bill 620).

We remand to the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill 620 and, in all other respects, affirm the judgment.

FACTUAL BACKGROUND

After a series of robberies occurred over a 15-day period in Fresno, California, defendant and Robert Lee Davis III were charged and tried jointly in connection with the offenses.[1] The court empaneled dual juries—separate juries for each defendant.

June 1, 2015, robbery of Belmont U-Save Liquor (Count 13)

On June 1, 2015, Rakesh Kumar was working at Belmont U-Save Liquor. At around 10:15 p.m., two men entered the store with their faces covered. One of them pointed a gun at Kumar and told him to lay down; the other man grabbed the cash register, which had approximately $200 to $300 dollars in it, and ran away. After the men left, Kumar called 911 and the store owner. Kumar reported the suspects were Hispanic or White.

The store had a surveillance system, and Kumar's boss gave copies of the surveillance video to police. The People played the surveillance footage for the jury at trial. Detective Daniel Messick, the lead investigator on the case for the Fresno Police

[1] An additional perpetrator, John Cabrera, was also charged in connection with some of the robberies, but his case was severed from the joint trial.

Department, identified defendant in court as one of the suspects from the surveillance footage of the robbery.

June 3, 2015, robbery of Fresno Central Market (Counts 10, 11, and 12)

Israel Martinez was working as a cashier at Fresno Central Market on June 3, 2015 at around 9:30 p.m. Juan Guerrero and Jose Escobedo were also behind the counter during the robbery. Escobedo was monitoring the cameras. Two men entered the store with a gun and a bag and told them "to give them … all the money in the register." The men were wearing hoodies and had bandanas around their faces. According to Martinez, one of the men was "light-skinned Mexican and the other one was black"; "the Mexican guy" pointed a gun at Martinez and "some people that were behind [him]," including Escobedo and Guerrero. He told Martinez to "put the money inside the bag and not to do nothing crazy." He was waving the gun around telling everyone "don't do nothing crazy." The other suspect also told Martinez to put money inside a bag. According to Martinez, he put approximately $1,000 in the bag. Detective Messick responded to the scene and retrieved the surveillance footage from the robbery. The People played the surveillance video footage at trial.

After the incident, Guerrero identified photographs of the suspects, including a photograph of Robert Davis, the codefendant. Guerrero did not identify defendant from the lineup. In his statement to police, defendant admitted he was the getaway driver during this robbery. John Cabrera was ultimately identified as the suspect with the firearm and Robert Davis was identified as the suspect with the bag getting the money. Detective Messick observed "a dark-colored [Dodge] Charger" in the surveillance footage recovered from the robbery.

June 12, 2015, robbery of Palm & Shields Liquor and assault with a firearm (Counts 7, 8, and 9)

Yadvinder Singh worked at Palm & Shields Liquor as a cashier on June 12, 2015. Harkamal Singh was assisting Yadvinder in the store that day. Two men entered the

store at around 1:00 a.m.; one was holding a gun. The men's faces were covered. The man with the gun pointed the gun at Harkamal and told him to raise his hands and stand to the side. He then pointed it toward Yadvinder and also told him to step aside while the other suspect tried to open the register. The gunman then told Yadvinder to open the register while pointing the gun at him. Yadvinder opened the register and the suspect without the gun took money out of it and from the cupboard below the register. He also grabbed a bottle of Hennessey liquor. Sara Mejia was a customer in the store during the robbery. The armed suspect ordered her to come to the front of the store and pointed the gun at her. He eventually told Mejia to get on the ground. Mejia saw the other suspect grab a liquor bottle.

The People played surveillance footage recorded during the robbery.

June 12, 2015, robbery of Penny Wise gas station (Counts 5 and 6)

Gurdev Singh and Sukhwinder Singh worked at a Penny Wise gas station (formerly a Shell) on June 12, 2015. At 1:50 a.m., two men entered the station; Sukhwinder identified them as a Black man and a Hispanic man. The Black man had a white cloth covering his face, though Sukhwinder could see the area around his eyes. The Hispanic man's face was exposed and he had a gun. Gurdev was in the door to the gas station when the two men approached and they told him to go back inside and open the register. Gurdev "tried to act dumb" like he did not "know anything about the register" and said "I don't know anything about that." Sukhwinder was in the back cooler when the suspects arrived, but he went to the front when he heard loud voices. He saw the Hispanic man pointing the gun at Gurdev and then the suspect pointed the gun at Sukhwinder, who ran back into the cooler. Gurdev went towards Sukhwinder and the Hispanic man followed. Gurdev then turned and ran outside. The two suspects followed and fired one or two shots before running away to a car that appeared new. They did not take anything from the store.

Following the incident, police presented Gurdev a photographic lineup of six pictures and he identified a photograph of defendant as the suspect with the gun, stating "he looks most like the guy." At trial, Sukhwinder was unable to identify the gunman in court.

Detective Messick retrieved surveillance footage from the gas station robbery and played portions of it for the jury. He identified defendant in court as the suspect in the surveillance footage of the robbery. Defendant also identified himself as one of the individuals that could be seen on the surveillance footage during his statement to police.[2] Defendant stated he was with Robert Davis during the offense and that John Cabrera was their driver. Defendant told police he brought the gun with him but gave it to Davis "because he wanted it" and Davis started shooting at them.

June 13, 2015, robbery of Super Liquor (Count 4)

Sunny Rall was working at Super Liquor on June 13, 2015. Shortly after midnight, two men entered the store, showed Rall a gun, and told him to open the register and then stay away from it. The men took cash out of the register, a carton of cigarettes, some expensive bottles of liquor, and the surveillance DVR and camera. The men's faces were partially covered by their sweaters, but Rall thought one man was Hispanic and the other was Black. According to Rall, the Black man pointed the gun while the Hispanic man grabbed the money and merchandise. Once the men left, Rall called the police. He then realized his car keys and his car were missing (and his wallet in his car).

June 15, 2015, robbery of Grant Market (Count 3)

Jose Arturo Sanchez Flores was working as a cashier at Grant Market, a community grocery store, on June 15, 2015. Two men entered the store with bandanas

[2]Notably, one of the suspects in the Belmont U-Save robbery was identified as wearing the same shoes and sweatshirt defendant wore during the Penny Wise robbery, and one of the suspects in the Palm & Shields Liquor robbery (that took place on the same date as the Penny Wise robbery) wore the same shorts, socks, and shoes defendant wore during the Penny Wise robbery.

covering their faces. One of the men demanded money and that Flores open the registers. Flores opened the two registers and one of the suspects took the money, totaling approximately $300, which included a $2 bill. The men also stole lottery tickets. Before the suspects left, they asked where the cameras were located. They pulled out the DVR until the wires broke and took it with them when they left. Flores described the suspects as two Hispanic males, one heavier than the other. A gray Dodge Charger was caught on security camera footage from a house near Grant Market.

Police received information and surveillance footage from the stores where the stolen lottery tickets were cashed. Detective Messick identified defendant in court as one of the individuals who could be seen cashing the stolen lottery tickets in surveillance footage. In his statement to police, defendant admitted cashing some of the stolen lottery tickets and identified himself on surveillance footage.

June 15, 2015, robbery of Palm Bluffs Liquor (Counts 1 and 2)

Navdeep Singh and Amderinder Singh were working at Palm Bluffs Liquor on June 15, 2015. Amderinder was taking trash out the front door when a man approached him with a gun telling him to move back. The suspect kept the gun pointed at Amderinder while another suspect told Navdeep to open the cash register. That suspect grabbed the money, boxes of Swisher Sweets cigarillos, and the surveillance DVR box; the suspects also took Navdeep's phone and wallet.

Logan Mitchell was sitting in a car outside of Palm Bluffs Liquor when he witnessed the two men with T-shirts tied around their faces approach an employee and the employee walked backwards into the store followed by the two men. Mitchell identified one of the men as African-American and the other as Hispanic. Mitchell called the police because the situation seemed suspicious.

Defendant's arrest and statements to police

Police focused their search on a gray Dodge Charger they concluded was involved in the robberies. The police identified a specific gray Dodge Charger they placed under

surveillance and arrested defendant while he was driving it.[3] A box of Swisher Sweets that was the flavor and brand stolen from Palm Bluffs Liquor was recovered from the trunk of the car along with a pair of shoes matching those the suspect wore in five of the robberies. Following defendant's arrest, police interviewed him after apprising him of his *Miranda* rights. Defendant admitted he was involved in some of the robberies the police were investigating. The prosecution presented defendant's recorded statement to police at trial.

The police next obtained search warrants for five addresses associated with defendant. Police recovered relevant evidence from two of the locations. Sergeant James Rosetti testified he documented items collected during the execution of a search warrant on June 17, 2015, on the 4500 block of East Floradora at defendant's half brother's home. At the residence, police recovered Sunny Rall's brown leather wallet (taken during the June 13th Super Liquor robbery), "multiple and various California lottery cards, scratchers," a container for a bottle of Rémy Martin liquor, multiple unopened five-packs of Show brand cigarillos, four Hennessy liquor containers, and two DVR systems, including one identified by the owner of Grant Market.

At another location associated with defendant, his uncle's residence on East Grant Avenue, police recovered a handgun, unopened packs of Marlboro cigarettes, Show cigarillos, and another Rémy Martin container. Sunny Rall's vehicle was located in the detached garage of the residence. A pair of defendant's basketball shorts with an Air Jordan symbol matching the description of the shorts the suspect wore in the Palm & Shields Liquor and Penny Wise robberies were collected from defendant at the jail.

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[3]Police arrested Davis separately and he was found in possession of approximately $1,376 on his person, including a $2 bill and a pair of pants police identified in some of the surveillance footage from the robberies. The parties stipulated that on June 10, 2015, between the time of the Fresno Central Market robbery and the Palm & Shields Liquor robbery, until June 17, 2015, Davis was required to wear a GPS tracking device monitored by Satellite Tracking of People (STOP). The data collected from Davis's ankle monitor placed Davis at the scene of four robberies that occurred after the monitor was placed.

Verdict

Following the presentation of evidence, the jury convicted defendant of all counts—nine counts of second degree robbery in violation of Penal Code section 211 (counts 1, 2, 3, 4, 7, 10, 11, 12, and 13), two counts of attempted second degree robbery in violation of sections 664, 211 (counts 5 and 6), and two counts of assault with a firearm in violation of section 245, subdivision (a)(2) (counts 8 and 9). The jury also found true enhancement allegations that defendant was armed with a firearm in violation of section 12022, subdivision (a)(1) (with respect to counts 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, and 13) and that he personally used a firearm pursuant to section 12022.53, subdivision (b) (with respect to counts 5 and 6).

DISCUSSION

I. No *Miranda* Violation

Defendant first contends the trial court erred in admitting his statements to police which he alleges were taken in violation of *Miranda*.

A. Relevant Procedural History

Police conducted a recorded interview with defendant on June 17, 2015. After asking defendant preliminary questions, Detective Messick informed defendant the police were "investigating a couple of cases right now" and before discussing them he was going to read defendant his *Miranda* warnings, to which defendant responded "All right." Detective Messick then read defendant his *Miranda* rights and, at the end, he asked defendant, "Do you understand each of these rights I have read to you?" Defendant responded, "Yeah." The police then continued questioning defendant and he continued to respond.

Defendant eventually admitted to participating in two robberies and driving Robert Davis and John Cabrera, defendant's cousin, to a store at Fresno Street and McKenzie around 9:00 p.m. on June 3, 2015, in exchange for money. According to defendant, he

dropped them off at a nearby corner and then picked them up; they had a bag with them defendant assumed contained money. Police told defendant they had footage of him with Robert Davis cashing lottery tickets that were stolen from Grant Market. Defendant admitted cashing the stolen tickets but reported Davis had given him the tickets; he denied he took part in the robbery. Defendant admitted participating in a June 12, 2015, robbery (the Penny Wise robbery) after the interviewing officers told him he was caught on the surveillance footage. Defendant admitted taking out a gun during that robbery and stated Robert Davis later asked for it and began "shooting at them." Defendant denied participating in the other robbery that occurred that date. He also denied involvement in other robberies and denied stealing the car taken during the June 13, 2015, robbery and found at defendant's uncle's house. To the extent defendant's car could be identified at the scene of the other robberies, defendant reported he let others, including his cousin Cabrera, use his car in exchange for money. During the interview, defendant repeatedly mentioned he was cold.

Before trial, defendant's counsel moved in limine to exclude defendant's statements to detectives on the grounds he did not sufficiently waive his *Miranda* rights. He argued:

> "[T]hey bring him in and … he is either—he is under the influence or apparently under the influence, he is put into a room where it is freezing cold, he asked for—he requests—objects to the cold, make comments about the cold repeatedly. There is chitchat, pleasantries, familiarization with people who he knows and doesn't know, and all of those, and then we give the Miranda warning real fast and all of a sudden talks to him about the Miranda warning, do you understand that, okay, let me ask you about your other sister. And I think that under the circumstances, the mechanism and the process did not give him an opportunity to fully understand and to assert his right to remain silent and his further questioning cannot be deemed to be a waiver. I don't think it is an unusual argument, Your Honor, but I think the circumstances are such that it would warrant intervention by the Court. And exclusion of the evidence, I'll just state."

The court conducted an Evidence Code section 402 hearing. Detective Tim Juarez testified defendant was arrested at approximately 11:00 p.m. on June 16, 2015, and interviewed at approximately 3:00 a.m. on June 17, 2015, though Detective Messick testified during trial and stated on the record during the interview that it began at 6:25 a.m. Detective Juarez was one of the officers who interviewed defendant. He was present when defendant was advised of his *Miranda* rights and defendant, within seconds, acknowledged he understood his rights before he was asked any incriminating questions; then, "[defendant] just started talking." Detective Juarez noted there was a conversation with defendant before the admonition was given. According to Detective Juarez, defendant did not appear to be under the influence, but rather he seemed to understand the rights read to him. He never asked to terminate the interview, invoked his right to remain silent, or requested an attorney. Defendant did complain about being cold.

Davis's counsel argued, considering "the totality of the circumstances … there was a coercive environment, it was cold, extremely cold." He noted Davis had been held for seven hours and displayed signs of intoxication and tiredness. Defendant's counsel concurred in counsel's comments about the setting and the circumstances. He argued:

> "… More importantly, I think a review of the video reflects that while [defendant] may have indicated that he understood his rights, this is more of a situation where he was—as a result of the technique of the interrogation, he wasn't given an opportunity to invoke his rights. It is one thing to say that he understood his rights, but I think when one hears and watches the video, it was a very carefully choreographed and scripted interview, where the witness is asked questions that seem innocuous about addresses, about location, about different people. And, oh, by the way, we are going to give you your Miranda rights and we're going to read those to you. Do you understand those? Yes. Okay, let's get back to the other questions that we were just asking. Because that is exactly what happened. There was a continuation of an interview where there were certain facts being elicited that appeared innocuous, then there was a Miranda given and [defendant] said, I understand my rights. And before he could say another word, he was asked another question that simply flowed from the prior comments that had been made.

> "Under those circumstances, the Missouri versus Seibert decision, 542 U.S. 600, at 615 through 617, reflects that where there is an interrogation and then a stoppage in the interrogation and then a resumption that the efficacy of the Miranda warning is in fact obviated. It says that—I believe it is at page 616, and it discusses the fact that there had been a series of questions. And in the Missouri versus Seibert decision there was in fact a complete interrogation given and then admonitions given and then the interrogation repeated. But the Court said that, 'Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led him through a systematic interrogation. Any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying, "We've been talking for a little while about what happened on Wednesday the 12th, haven't we?" The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given.'
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> "So what we have here, Your Honor, is, as—as criticized in the Berghuis versus Thompkins decision, a setting where you have a coerced setting, you had a—or a custodial setting, you have witnesses, plural, complaining about the cold, nothing being done about the cold, you have the interviews being taken at an inappropriate—or at a particular time, and you have a witness who was not given the opportunity to invoke the right to remain silent. And the fact that he continued to respond to questions that were similar in nature to those that he was propounded prior to the warning demonstrates that it was an ineffective Miranda warning and therefore there can be no waiver."

Defense counsel argued, in summary, the video demonstrated "there was not a proper admonition and any claimed waiver is therefore invalid."

The court held defendant's statements admissible and concluded there was no *Miranda* violation. It noted, based upon the evidence presented,

> "[C]learly … each of the defendants had the capacity to waive [his *Miranda* rights]. There was not an express waiver but an implied waiver, where the defendants were each given their rights, they were each asked separately during the separate interviews whether they understood their rights, and they each acknowledged that they understood the rights by each saying, 'Yeah,' quote.

"There is no evidence that either defendant was under the influence of any drugs or alcohol at the time of the waivers being given….

"The only other indication from either defendant that they may have been under the influence of alcohol was that each of them seemed to burp or belch during the course of the interrogation at different times. But I also note that each of them had apparently been fed and had—appeared to have water or soda or something of that sort. So I discounted that belching or burping and attributing that to any alcoholic beverage intake by either defendant. Each of—there is nothing suggesting that the defendants—either defendant lacked the capacity to waive their right. And clearly they did waive the right, they each continued to answer questions specifically about the events that the law enforcement officers were investigating.

"There was a discussion when this motion was raised about the issue of softening up the defendant, or a defendant. While that is a process that could negate any waiver, clearly that's not the case here that there was any softening up. In the case of [defendant], when he was first brought into the room, he was told that the officers were investigating a couple of cases, meaning that—and they wanted to talk to him about that, meaning that he was aware of it, he was told very early on that they were investigating a crime that he may have been involved in. They then proceeded to ask [defendant] questions about his background, date of birth, name, residences, family members.

"That does not amount to softening up and in a way that it is classically defined under the case of People versus Honeycutt—for which I do not currently have the citation, but it is a California Supreme Court case. And I'll have that in just a moment. But this is not where a suspect was initially reluctant to give a statement, then, in the case of Honeycutt, an investigating officer familiar with the defendant then came in and spoke to him about their familiarity and about past events, about past acquaintances, and then after getting the person feeling comfortable, the person then said they were willing to speak with law enforcement, and then another law enforcement officer came in and conducted the actual interrogation after the defendant waived his Miranda rights. This is not that case. This is, rather, where the officers, as pointed out by one of the detectives, and I'm not sure which one was speaking, but indicated that they had never met him before and wanted to get background information from him. And that by that I mean [defendant]. So they proceeded to get that information.

"It is also evident, based upon the questions and answers given at that point, that [defendant] was not under the influence, was not coerced in any way whatsoever providing information. So there is nothing suggesting

that his statement to law enforcement was involuntary, either before or after Miranda advisements. [¶] … [¶]

"Nor is it a case where there was any suggestion that—or implication that law enforcement was going to do something for the benefit of the defendant if the defendant cooperated. And again, I'm referring to [defendant]. Because there is one point just before the break in the discussions where [defendant] makes a statement to the effect that he could provide him information and not just about that particular—this particular case. These detectives did not, what I would say, take the bait and then come in and say, well, yes, why don't you give us information and we'll do this, we'll do that. There was none of that going on. There was no quid pro quo. So the bottom line, there is no showing that there was any softening up done by the officers in this case.

"So there being an implied waiver of Miranda rights in a situation where the waiver was required, given that the defendants were each in custody, were subject to interrogation, and their continuing with the discussion, answering law enforcement's questions, the Court finds that the statements made were freely, voluntarily and knowingly given after the advisement of the Miranda rights.

"… [W]e don't have here a case where there was a deliberate withholding of Miranda warnings for the purpose of getting a statement from someone and then going back in and giving those Miranda warnings and basically attempting to have a repeat of the statement and in fact an almost impeachment of the suspect with the prior statement.…

"… So the Court would allow the statements, Mirandized statements of the defendants to be received into evidence."

The court further noted it "[did] not believe the temperature of the room was such that it became coercive to the point that the defendants did not make a voluntary waiver and were in any way coerced in making their statements to law enforcement."

B. Standard of Review

In *Miranda*, *supra*, 384 U.S. 436, the Supreme Court formulated a warning that must be given to suspects before they can be subjected to custodial interrogation. Accordingly, a suspect in custody must be advised as follows:

"He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that

> he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." (*Id*. at p. 479.)

When reviewing a ruling admitting a confession, we accept the trial court's resolution of any factual dispute to the extent the record supports it, but otherwise we determine independently whether the confession was taken in violation of the rules of *Miranda*, *supra*, 384 U.S. 436, or was involuntary. (*People v. Duff* (2014) 58 Cal.4th 527, 551.) On both questions, the People bear the burden of proof by a preponderance of the evidence. (*Ibid*.)

C. Applicable Law—Knowing and Intelligent Waiver

> "*Miranda* makes clear that in order for defendant's statements to be admissible against him, he must have knowingly and intelligently waived his rights to remain silent, and to the presence and assistance of counsel. [Citation.] [¶] It is further settled, however, that a suspect who desires to waive his *Miranda* rights and submit to interrogation by law enforcement authorities need not do so with any particular words or phrases. A valid waiver need not be of predetermined form, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision. [Citation.] We have recognized that a valid waiver of *Miranda* rights may be express or implied. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 667.)

"[U]ltimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation." (*People v. Cruz*, *supra*, 44 Cal.4th at p. 668.) This means relinquishment of the right must have been voluntary—it was the product of a free and deliberate choice rather than intimidation, coercion, and deception—and it must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. (*People v. Whitson* (1998) 17 Cal.4th 229, 247; see *People v. Cruz*, *supra*, at p. 669 ["The test for determining whether a confession is voluntary is whether the questioned suspect's 'will was overborne at the time he confessed.' [Citation.]"].) "'Once it is determined that a suspect's decision not to rely on his rights was uncoerced,

that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.' [Citation.]" (*People v. Whitson*, *supra*, at p. 247.)

Important to the present case, "[a] suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights. [Citations.]" (*People v. Cruz*, *supra*, 44 Cal.4th at pp. 667–668; accord, *People v. Medina* (1995) 11 Cal.4th 694, 752; *People v. Sully* (1991) 53 Cal.3d 1195, 1233.) This principle has been upheld by the United States Supreme Court, which explained: "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384–385 [finding implied waiver of *Miranda* rights].)

D. Analysis

Defendant argues his statements to police were custodial and taken in violation of his *Miranda* rights. Specifically, defendant contends "there was no express or implied waiver of his constitutional rights." He notes, though "he indicated 'Yeah.' in response to whether he understood his rights," the interview occurred in the "very early morning in a very cold atmosphere," "[t]here was also an indication that [defendant and his codefendant were] intoxicated" during the interviews, and "the Miranda warnings were not read immediately and only occurred after a series of other lengthy questions." He asserts the "introduction of this evidence at trial, over his unsuccessful motion in limine to exclude the evidence, violated his rights to remain silent, to a fair trial, to reliable determinations of guilt and penalty, and to due process under the federal and state

Constitutions."[4] The People respond "[t]he record clearly establishes that [defendant] impliedly waived his *Miranda* rights when he acknowledged that he understood them and then continued to talk to the detectives." After conducting an independent review of the record, we conclude the totality of the circumstances surrounding the interrogation reveals defendant made an uncoerced choice to voluntarily and knowingly waive his *Miranda* rights when he continued to speak with detectives after he was informed of his *Miranda* rights and acknowledged his understanding.

Defendant's willingness to answer questions after acknowledging his understanding of his *Miranda* rights constituted an implied waiver of such rights. (See *People v. Cruz*, *supra*, 44 Cal.4th at pp. 667–668; accord, *People v. Medina*, *supra*, 11 Cal.4th at p. 752; *People v. Sully*, *supra*, 53 Cal.3d at p. 1233.) The record reflects defendant's waiver was voluntary. Here, the officers were cordial with defendant throughout their meeting and there is no evidence they attempted to intimidate, coerce, or deceive him into waiving his *Miranda* rights. The police provided defendant food to eat before the interview and, though the interview occurred early in the morning and defendant complained he was cold, he never asked the deputies to stop the interrogation for those reasons. Defendant was alert and receptive throughout the questioning, and the record provides no evidence of any other form of coercive police activity. (See *People v. Whitson*, *supra*, 17 Cal.4th at pp. 248–249 ["[T]he record is devoid of any suggestion that the police resorted to physical or psychological pressure to elicit statements from defendant. To the contrary, defendant's willingness to speak with the officers is readily apparent from his responses. He was not worn down by improper interrogation tactics, lengthy questioning, or trickery or deceit. [Citations.] … The voluntariness of the

[4]Defendant also argues: "Detective Lowry improperly continued to interrogate him after he invoked his right to counsel." The People correctly note: "The record in this case does not contain any references to a Detective Lowry, nor did [defendant] invoke his right to counsel at any time." Accordingly, we cannot conclude defendant's assertion is supported by the record or supports his argument his *Miranda* rights were violated, and we do not address it further.

waiver therefore is clear"]; *People v. Cruz*, 44 Cal.4th at p. 669 ["Defendant does not allege that any improper promises or threats were made, and we see no evidence of any other form of coercive police activity that would support a finding of involuntariness"].)

Importantly, the detectives advised defendant of his *Miranda* rights before asking him about his involvement in the robberies, and the uncontroverted evidence establishes defendant affirmatively told the interviewing officers he understood those rights. Contrary to defendant's argument, there is no evidence defendant appeared to be under the influence of drugs or that he otherwise did not understand his rights. In fact, during the interview, defendant expressly denied he had been using drugs or that he was drunk. Detective Juarez also testified he did not notice signs defendant was intoxicated; rather, defendant appeared to understand the rights read to him. Additionally, defendant's answers were responsive to the detectives' questions.

Accordingly, the People met their burden of proving defendant understood his rights, and he knowingly and intelligently waived those rights when he provided an uncoerced statement to police. (See *People v. Cruz*, 44 Cal.4th at pp. 668–669 ["defendant's responses to [the detective's] inquiries reciting his *Miranda* rights reflect a knowing and intelligent understanding of those rights, and … defendant's willingness to answer questions after expressly affirming on the record his understanding of … those rights constituted a valid implied waiver of them"]; *Berghuis v. Thompkins*, *supra*, 560 U.S. at p. 385 ["The record in this case shows that [the defendant] waived his right to remain silent. There is no basis in this case to conclude that he did not understand his rights; and on these facts it follows that he chose not to invoke or rely on those rights when he did speak"].) Thus, the trial court did not err in admitting defendant's statement to police, and its admission did not violate defendant's due process rights or his right to a fair trial.

We reject defendant's first contention.

II. No Error in Denying Defendant's Motion for New Trial Based on Juror Misconduct

Defendant next argues the trial court erred in failing to grant his motion for new trial based on alleged juror misconduct.

A. Relevant Factual Background

Before trial, the court admonished the jury:

> "Do not talk about the case, about any of the people or about any subjects involved in it with anyone, including other jurors. Do not make up your mind about the verdict or any issue until after you discuss the case with other jurors during deliberations."

The court repeated this admonishment throughout the trial. After the close of evidence and the prosecution's closing argument but before defendant's closing, Juror No. 30 sent the court a note stating:

> "This is probably nothing but since I can't talk to anyone about this, I needed to ask if the following was correct. [¶] This morning Juror #5[1] (the young male) walk[ed] into the deliberation room and made a comment stating that [defendant] was clearly guilty and that we could all made [*sic*] it go faster if we all agreed with him."

The judge called Juror No. 30 to discuss the incident before counsel. Juror No. 30 explained:

> "Well, when we came in in the morning waiting to be called and when that young guy, he walks in and we were just talking about, you know, how the process should—you know, once the deliberation starts, how it is usually done. And [Juror No. 51] came in, he just said, you know what, he says, carry [*sic*] guilty. And if you all agree with me, it should get this done fast. And it just—it bothered me because of what you had been repeating every single day. [¶] … [¶] … So when somebody repeats everything and it's like—that is why it bothered me. But it's like, okay, should I say something or should I just let it go. And my conscience just kept telling me, you know what, at least ask. Maybe it's nothing."

Juror No. 30 could not recall if other jurors were present when Juror No. 51 was speaking and she did not hear anyone else make comments about Juror No. 51's statements. In response to the judge's questions, Juror No. 30 confirmed she believed she

could still serve as an impartial juror. The court then called Juror No. 51 in for questioning and Juror No. 51 admitted he told Juror No. 11 that his "mind was made up" but Juror No. 11 did not say anything in response, "he just laughed." He mentioned there were other conversations that morning: "[I]t wasn't about the trial. Just like how we almost fell asleep and stuff. I don't know if that qualifies on that topic or not." Juror No. 51 was not sure if others heard his comment but noted he "was not like whispering or anything." He stated that was the first time he expressed his view concerning defendant's culpability. He further admitted "before the case even started, [his] mind was made up." The court questioned Juror No. 51 further about the conversations that occurred that morning. Juror No. 51 stated the jury discussed whether the Davis jury was "going to be [t]here today" and "where [they] left off in the case … [and] what time [they] were going to get out." The judge excused Juror No. 51 from the jury panel.

The court then called Juror No. 11 in to discuss the incident. Juror No. 11 reported he did not recall Juror No. 51's comment about his view concerning defendant's guilt. He stated, even if made, any such statements would not affect his ability to perform his duties as a juror and impartially consider the evidence. Juror No. 11 also confirmed he had not expressed or formed any opinion concerning defendant's guilt or innocence. Defense counsel argued Juror No. 11 should also be dismissed; he argued he did not think Juror No. 11 was being honest and disputed whether defendant could have a fair trial with this jury. The court denied defense counsel's request, noting:

> "What is most important here is when I asked him directly whether any statement that had been made would affect his ability to be an impartial juror in this case, it was an unequivocal statement that, no, any statement would not affect his ability to be fair and impartial in this case. [¶] … I do not feel that juror ****11 has indicated any prejudging of the evidence or any inability to keep an open mind and deliberate on the evidence in this case along with the other 11 jurors. So the request to excuse juror ****11 at this point is being denied."

The court then advised the whole jury that one of the jurors was excused because he "did not follow the Court's many admonitions about not forming or expressing an opinion about the case until the deliberations begin in this case." The court then asked the jury: "[H]ave any of you expressed or formed an opinion concerning [defendant] in this case?" The court confirmed on the record no one raised his or her hand. The court then asked the jurors: "Has anything occurred in the jury room that any of you wish to bring to the Court's attention, even out of the presence of the other jurors?" The court gave the jurors until the following day to alert the court to any additional issues. The following day, the court noted it did not receive any additional notes from the jury. At that point, defense counsel moved for a mistrial "in light of the misconduct" arguing, "One gentleman, juror number 5[1] and juror number ****11, as well as juror number [30], indicated that there were discussions about the process, and the deliberating process beforehand." The court denied the motion for mistrial. It reasoned:

> "… The Court made an inquiry of juror ****51. The Court was satisfied that individual could not continue to serve on this jury, and for that reason, that person was removed from the jury. [¶] As to juror ****11, the Court did have an opportunity to assess his credibility as to whether he could remain on the jury and be impartial when considering the evidence, and also as to whether he had formed or expressed any opinion concerning the case. The Court was satisfied that he could remain on the jury. The Court also heard the statements of juror ****30 … about the fact that jurors were discussing the process. At the urging of counsel, the Court made further inquiry of … juror ****30 … to determine exactly what that was. It was apparent to the Court that the conversation concerned what happened next and that the conversation was not about this particular case but actually was statements by persons who may have previously served as jurors as to, you know, how they go about picking a foreperson, how long does it take, ordinarily, to proceed once the case is submitted to the jurors, things of that nature. There was nothing stated by juror ****30, and actually, for that matter, either by juror ****51 that suggested the jurors were in any way discussing the evidence or the allegations in this particular case. And I suspect that if there were such discussions taking place that juror ****51 would have no reservations about raising those statements in

> the presence of the Court and counsel and out of the presence of his fellow jurors. [¶] … [¶]
>
> "In any event, the Court is satisfied that the defendant can receive a fair trial in the presence of the 12 sworn jurors that we do have and the 1 alternate in the case, if one of the sworn jurors was unable to complete his or her duties. So the motion for a mistrial will be denied."

B. Standard of Review and Applicable Law

"[T]o establish juror misconduct, the facts must establish '"an inability to perform the functions of a juror, and that inability must appear in the record as a demonstrable reality."' [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1351.) """Misconduct by a juror … usually raises a rebuttable 'presumption' of prejudice."""" (*People v. Loker* (2008) 44 Cal.4th 691, 746–747.) To find the presumption of prejudice has been rebutted, there must be either an affirmative evidentiary showing of no actual bias, or a determination by the reviewing court after considering "'[a]ll pertinent portions of the entire record, including the trial record …' [citation], that there is '"no substantial likelihood"' of actual harm to the defendant from the misconduct." (*People v. Brooks* (2017) 3 Cal.5th 1, 93; see *People v. Lavender* (2014) 60 Cal.4th 679, 687.)

Penal Code section 1089 provides that a trial court may discharge a juror who "becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty" and, once put on notice that good cause to discharge a juror may exist, the court has a duty to make whatever inquiry reasonably necessary to determine whether the juror should be discharged. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1351.) """The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court."""" (*People v. Fuiava* (2012) 53 Cal.4th 622, 702; see *People v. Bradford*, *supra*, at p. 1351.)

> "In general, 'a motion for mistrial should be granted only when "'a party's chances of receiving a fair trial have been irreparably damaged.'"' [Citation.] 'We review a ruling on a mistrial motion for an abuse of

> discretion. [Citations.] A trial court should declare a mistrial only "'if the court is apprised of prejudice that it judges incurable by admonition or instruction.'" [Citations.] "In making this assessment of incurable prejudice, a trial court has considerable discretion."' [Citation.]" (*People v. Bell* (2019) 7 Cal.5th 70, 121; see *People v. Johnson* (2018) 6 Cal.5th 541, 581.)

C. Analysis

Defendant argues "there is an indication of several occurrences of juror misconduct," and the court failed to conduct an adequate inquiry into the misconduct and should have removed Juror No. 11. Specifically, defendant first contends Juror No. 30 and Juror No. 51 established "the jury had been discussing the case prior to being charged," and "it was alluded to that they had had similar discussions on days prior." Defendant contends "[t]he court had a duty to hold a full hearing to determine the breadth of conversations that occurred," but it "only inquired as to whether the jurors could continue to remain impartial." Second, defendant argues the trial court also "did not inquire further about who in fact overhea[r]d Juror #51 state they should just vote guilty," though "[d]efense counsel made this request" and "[t]he court was obligated to find out who exactly heard that statement." Third, he asserts there were "possibly additional statements made by jurors during the course of the trial," and "[t]he court had a duty to follow up with the other jurors to find out whether any similar conversations took place over the course of the long trial." Fourth, he asserts though Juror No. 51 stated he told Juror No. 11 his mind was made up, Juror No. 11 "denied hearing such statements," and the "denial is problematic because it implies one of the two was not telling the truth." The court "had a duty to inquire from the others about whether they in fact overhea[r]d and whether Juror #11 was there and heard." Fifth, he argues the court had a duty to inquire further about Juror No. 51's statement: "Yes. Just by little conversations everyone has, just—it wasn't about the trial. Just like how we almost fell asleep and stuff. I don't know if that qualifies on that topic or not." Sixth, he asserts "given the conflicting testimony from Juror #51 and Juror #11, the court should have removed Juror

#11 [out of an] abundance of caution." Finally, defendant contends the court's inquiry to the jurors regarding whether they could remain impartial "invite[d] a scenario where no specific individual wanted to speak up." Instead, he argues, the court should have "question[ed] each juror individually about what they heard, and the effect that may have had," but the "court declined to do so." In response, the People do not dispute Juror No. 51's statements regarding defendant's guilt before deliberations began constituted misconduct. Rather, they argue "[t]he presumption of prejudice arising from Juror #51's misconduct was rebutted." The People contend: "By removing the juror who committed misconduct and ensuring that the remaining jurors were able to continue serving as impartial jurors, any presumption of prejudice created by Juror #51's statements was rebutted."

1. The trial court did not abuse its discretion investigating misconduct

The crux of defendant's claim is the trial court failed to adequately investigate allegations of juror misconduct. Once a court is made aware of the possibility of juror misconduct during deliberations, it must decide whether the information before the court warrants any investigation into the matter. (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 710.) "If some inquiry is called for, the trial court must take care not to conduct an investigation that is too cursory [citation], but the court also must not intrude too deeply into the jury's deliberative process in order to avoid invading the sanctity of the deliberations or creating a coercive effect on those deliberations [citation]." (*Ibid*.) Trial court decisions about whether and how to conduct such an investigation are reviewed on appeal under the traditional abuse of discretion test. (See *id*. at pp. 702–703.)

On the record before us, we cannot conclude the trial court abused its discretion in the manner in which it inquired into potential juror misconduct. Here, upon receipt of Juror No. 30's note regarding potential misconduct by Juror No. 51, the court promptly called Juror No. 30 to the courtroom to discuss the allegation further with both parties'

counsel present. In response to the court's questioning, Juror No. 30 confirmed she believed she could still serve as an impartial juror. Based on Juror No. 30's comments, the court continued its inquiry by calling Juror No. 51 to discuss his comments before the court and counsel. Juror No. 51 admitted he told the juror who sat in front of him in the jury box, Juror No. 11, that his "mind was made up." The court excused Juror No. 51 from the jury panel because it was obvious he could not "be fair and impartial … despite the oath [he] took and despite the admonition given by the Court." The court then spoke to Juror No. 11 before counsel regarding Juror No. 51's comment. Juror No. 11 did not recall the comment and confirmed, even if it had been made, it would have no bearing on his ability to perform his duties as a juror and to impartially consider the evidence. Finally, the court asked the whole jury whether they had expressed or formed an opinion about the case and whether anything else occurred in the jury room requiring the court's attention. It gave the jurors the opportunity to raise any additional concerns or issues privately by note by the following day, and it readmonished the jurors not to make up their minds or express any opinion about the case or any issue connected with the trial until they discussed the case with each other in deliberations. The court did not receive further reports of misconduct.

On this record, we conclude the trial court reasonably focused its inquiry on the juror whose ability to serve was in doubt—Juror No. 51—and it ultimately discharged him. The court further spoke individually to the people who were alleged to have heard the comment and confirmed their ability to perform their duties and impartially consider the evidence. It repeated its advisements to the entire jury not to prejudge the evidence or discuss the case before deliberations began and provided the other jurors an opportunity to report any additional misconduct both openly before the court or privately in a note. There is no indication the jurors failed to report additional misconduct because they were not questioned individually. Accordingly, the court reasonably could have determined no further inquiry was necessary; we find no abuse of discretion. (See *People v. Bell*, *supra*,

7 Cal.5th at p. 120 ["Here, the record demonstrates adequate inquiry. The court questioned jurors about their conversations, ensuring they did not discuss the facts of the case. The court expressed its concern that jurors remain unbiased because of the incident and invited jurors to notify the court privately if they had any such inclinations. Defendant's speculation that jurors failed to disclose personal fears or bias has no basis in the record. Such speculation does not support a duty to inquire further"]; *People v. Fuiava*, *supra*, 53 Cal.4th at p. 712 [court reasonably focused inquiry on juror whose ability to serve was in doubt].)

2. Trial court did not abuse its discretion by retaining Juror No. 11

Defendant also contends the court should have discharged Juror No. 11 based on his failure to recall Juror No. 51's comment and out of an "abundance of caution." We disagree.

"'[U]nder [Penal Code] section 1089, a trial court "has *broad discretion* to investigate and remove a juror in the midst of trial where it finds that, for any reason, the juror is no longer able or qualified to serve."' [Citation.]" (*People v. Fuiava*, *supra*, 53 Cal.4th at p. 711.) Here, Juror No. 11 denied hearing Juror No. 51's comment and confirmed that, even if he had, it would not affect his ability to act as an impartial juror. The court assessed Juror No. 11's credibility and ultimately concluded he was still qualified to serve and be impartial. The trial court was in the best position to evaluate Juror No. 11's demeanor and, under these circumstances, we defer to its credibility determination. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1305.) On this record, the trial court did not abuse its discretion in determining, after interviewing Juror No. 11, that he could be fair and impartial and should not be excused for cause.

3. Presumption of prejudice was rebutted and trial court did not err by denying defendant's request for a mistrial

Finally, as a general matter, we conclude the presumption of prejudice arising from Juror No. 51's misconduct was rebutted. Juror No. 51 was discharged from service.

Juror No. 11 and Juror No. 30, the only jurors alleged to have been privy to Juror No. 51's comments, confirmed on the record they could continue to serve as impartial jurors. Juror No. 11 in fact denied hearing Juror No. 51's comment. And the court asked the rest of the jury whether they had expressed or formed an opinion concerning defendant and to report any additional misconduct in light of the court's inquiry publicly or privately; no additional misconduct was brought to light. This record reflects the other jurors were not influenced by Juror No. 51's comment and there was no evidence of other misconduct. Moreover, the court repeated its admonishment to the jury that they were not to prejudge the case and we presume the jury followed this instruction. Under these circumstances, we conclude the presumption of prejudice was rebutted because there is "no substantial likelihood" of actual harm to defendant from the misconduct. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

We reject defendant's second contention.

III. Remand in Light of Senate Bill 620

Senate Bill 620, signed into law on October 11, 2017, amended Penal Code sections 12022.5 and 12022.53 to provide the trial court with discretion to dismiss, in furtherance of justice, firearm enhancements pursuant to sections 12022.5, subdivision (c), and 12022.53, subdivision (h). The new law took effect on January 1, 2018. The law is applicable to those parties, like defendant, whose appeals were not final on the law's effective date.

Here, defendant seeks remand for a new sentencing hearing to permit the court to exercise its discretion regarding whether to strike the firearm enhancements in light of Senate Bill 620. The People concede Senate Bill 620 applies retroactively and that remand is appropriate on this basis.

The Supreme Court has held: "'A court which is unaware of the scope of its discretionary powers can no more exercise that "informed discretion" than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.' [Citation.] In such circumstances, … the appropriate remedy is to remand for resentencing unless the record 'clearly indicate[s]' that the trial court would have reached the same conclusion 'even if it had been aware that it had such discretion.' [Citations.]" (*People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

The record before us does not reflect the trial court knew it had discretion to strike defendant's firearm enhancements, nor does it reflect a clear indication by the trial court that it would not have struck these enhancements if it had discretion to do so. Thus, while we offer no position on how the trial court should act when exercising its newfound discretion under Senate Bill 620, we conclude the trial court should be provided the opportunity to exercise that discretion.

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under Penal Code section 12022.53, subdivision (h), as amended by Senate Bill 620 and, if appropriate following exercise of that discretion, to resentence defendant accordingly. In all other respects, the judgment is affirmed.

_____

PEÑA, J.

WE CONCUR:

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FRANSON, Acting P.J.

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DESANTOS, J.